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Who's in Charge Here: Judicial Activism and the Practicing Attorney

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COMMENTS

WHO'S IN CHARGE HERE: JUDICIAL ACTIVISM AND THE PRACTICING ATTORNEY

But *why* do they not object? In a nation dedicated to government by consent of the governed, how is it that the people acquiesce in the exercise of broad veto power over acts of their elected representatives by the vote of a majority of nine Justices who are almost completely insulated from electoral control?¹

The above statement by Louis Lusky in *By What Right?* represents a growing opinion within the ranks of the legal profession and even within the general populace. The purpose of this article is not to provide the reader with a comprehensive guide to the almost innumerable and often nearly incomprehensible theories regarding the phenomenon described above and commonly referred to as judicial activism. The aim is rather to increase the practicing attorney's awareness of the basic issues involved and, hopefully, to encourage within the attorney a concern about the problem that will lead to positive action.

Articles and treatises expounding "new" predictive and descriptive theories of judicial activism seemingly appear almost daily. Prescriptive theories appear with only slightly less frequency. These writings often generate great excitement within the ranks of the legal scholars and academicians,² but are met with yawning apathy by most practicing attorneys. This attitude is a dire mistake because it has the effect of leaving the field open to the whims of the writers and the judges. Attorneys can and should make their views known and thereby have an effect on the direction taken in constitutional jurisprudence.

TOWARDS A DEFINITION OF JUDICIAL ACTIVISM

The starting point of this discussion must, of course, be with the definition of "judicial activism." Arthur Miller has said that: "By activism is meant the propensity of federal judges . . . to intervene in the governing process, so as to substitute their judgment for that of federal and state political officers."³ The problem with this kind of definition, typical of those found in most writings,⁴ is that it assumes much and explains little. Miller's definition serves nicely for the aims of this article, however, because it conveys the true flavor of judicial activism as an intervention in an otherwise

1. LUSKY, *BY WHAT RIGHT?* 31 (1975).

2. Examples of the excitement among academicians are the symposiums that often follow the publication of a new work. Following the publication of Ely's and Choper's books, the Ohio State Law Journal devoted an entire issue to a discussion of their theories. *Judicial Review versus Democracy*, 42 OHIO ST. L.J. 1 (1981). Likewise, the University of Dayton published a symposium issue following publication of Perry's book. *Judicial Review and the Constitution—The Text and Beyond*, 8 U. DAYTON L. REV. 443 (1983).

3. MILLER, *TOWARD INCREASED JUDICIAL ACTIVISM* 6 (1982).

4. Most writers, of course, propose a definition which serves nicely to advance their particular theory. Often, they will speak in terms of judicial review rather than judicial activism. These two terms are usually thought of as being interchangeable but distinguishing between the two often becomes important. See *infra* text accompanying notes 33-48.

orderly and adequate political process. When evaluating the above definition, it is useful to note that Miller is the quintessential proponent of judicial activism.⁵

Another means of finding a definition of judicial activism is to briefly examine the practice. Probably the most familiar, and most blatant, recent use of judicial activism occurred in the 1973 *Roe v. Wade* decision.⁶ Of this decision, Lusky stated that: "At least eight of the nine (Justices) showed themselves ready to engage in freehand constitution-making in order to combat what they viewed as basic injustice, in any field where they thought the Court's intervention would be helpful and effective."⁷

The decision rested upon an extension of the judicial cure-all known as "the right to privacy."⁸ Like the right to contract which served as the basis for decision in *Lochner v. New York*,⁹ the right of privacy is nowhere explicitly enumerated in the Constitution. The privacy right first gained the prominence it now has in Supreme Court decisions in Justice Goldberg's concurring opinion in *Griswold v. Connecticut*,¹⁰ where he stated that the right to privacy is "found in the ninth amendment."¹¹ When applying the right to privacy in *Roe v. Wade*, Whitehead points out¹² that Justice Blackmun admitted that the Constitution does not mention any right to privacy. Blackmun stated that: "in varying contexts, the Court or individual justices have, indeed, found at least the roots of that right . . . in the concept of liberty guaranteed [in the] . . . Fourteenth Amendment."¹³

A critical reading of the decision reveals that little reliance was placed even on this "right." The dearth of authority is even more pronounced when the minutely detailed rules formulated by the Court are examined.¹⁴ Rules possessing such specificity are clearly not arrived at through interpretation of the general provisions of the Constitution. Passage of such guidelines is properly the function of Congress.¹⁵ As a branch comprised of the elected representatives of the people, it is more responsive to their

5. Miller states in his book that: "more judicial activism is both necessary and desirable . . . if it furthers the attainment of human dignity . . . in America and if it helps Americans make necessary social and political adjustments. . . ." MILLER, *supra* note 3, at 9 (emphasis in original).

6. *Roe v. Wade*, 410 U.S. 113 (1973).

7. LUSKY, *supra* note 1, at 13-14.

8. WHITEHEAD, *THE SECOND AMERICAN REVOLUTION* 123 (1982).

9. 198 U.S. 45 (1905).

10. 381 U.S. 479 (1965).

11. *Id.* at 492. See WHITEHEAD, *supra* note 8, at 20-21. The ninth amendment reads as follows: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

12. WHITEHEAD, *supra* note 8, at 123.

13. *Roe v. Wade*, 410 U.S. 113, 152 (1973).

14. The *Roe v. Wade* rules are now well-known. The Court held that: "(a) For the stage prior to approximately the end of the first trimester the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's physician. (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. (c) For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Roe v. Wade*, 410 U.S. at 164-65.

15. LUSKY, *supra* note 1, at 16.

needs and desires. Where, then, did the Justices look for guidance, if not the Constitution, the supreme law of the land? The answer is that they looked to their own consciences and their own perceptions of what was best for the country and most desired by its citizens. This endeavor may be laudable, but is certainly not the proper function of the Supreme Court of the United States.

Those who agree with the conclusions drawn above need to wake up from their "yawning apathy" to judicial activism. If the idea of a judge or a court making decisions according to the judges' own conscience is even slightly disturbing, it is important to become more informed about the issues involved and to decide whether the problem is serious enough to warrant taking a stand against judicial activism. Those who feel that an active judiciary is a desirable thing but who have not come to this decision after careful consideration of all relevant information also should become more informed because an informed decision is clearly superior to an uninformed one.

THE PROPER ROLE OF A JUDGE—THE ORIGINS OF THE LAW AND THE ORIGINS OF THE SPECIES

The proper role of judges has been the focus of debate in this country since its founding and has been discussed in other countries for centuries. In *De Vera Religione*, Augustinian said that: "Once laws are established and sanctioned judges must not be allowed to judge them: they are to judge according to them."¹⁶ To Augustinian, then, the role of the judge did not include judicial review or judicial law-making. In the Bible, the Book of Leviticus, Chapter 19, verse 15, it says: "you shall do no injustice in judgment; you shall not be partial to the poor nor defer to the great, but you are to judge your neighbor fairly."¹⁷ The proper role of a judge is thus also a matter of Divine concern.

In his book *The Second American Revolution*,¹⁸ Edward C. Whitehead effectively traces back to their roots the myriad theories of judicial activism currently in vogue. Obviously, American jurisprudence is derived from the English tradition and experience. Law in the United States was originally taught in law offices with *Blackstone's Commentaries* used as the basic text.¹⁹ As stated by Whitehead, this method of teaching reflected "[t]he prevailing opinion . . . that the principles and doctrines of the law were unchanging."²⁰ For Blackstone, the laws of man had as their twin foundations natural law and revelatory law.²¹ Both of these types of law are given by God and are discoverable. Blackstone said: "In compassion for the imperfections of human reason, God has mercifully at times discovered and enforced His laws by direct revelations. These are found in the holy scrip-

16. HIGGINS, JUDICIAL REVIEW UNMASKED 15 (1981) (quoting AUGUSTINIAN, *DE VERA RELIGIONE*, XXXI, 58).

17. *Leviticus* 19:15 (RSV).

18. WHITEHEAD, *supra* note 8.

19. *Id.* at 47.

20. *Id.*

21. W. BLACKSTONE, *COMMENTARIES* 27 (B. Gavit ed. 1941).

tures."²² The legislators were to look to God's laws when making man's laws and the judge was to interpret the product of the legislature in light of this presumed intention. Because the final objective of man's law was to perfectly carry out God's law, the judge's role was to enforce the law rather than attempt to change it. "The Christian world view teaches a unified view of truth. Its principles deal in absolutes that do not vary according to circumstances but should, in fact, govern the actions of man as he responds to constantly changing conditions."²³

The beginnings of judicial review in America can clearly be traced to the *Marbury v. Madison* decision.²⁴ Judicial activism has a different source, however. Whitehead points to the introduction in the 1870's of the "case method" of teaching law into the classroom by Christopher Langdell, Dean of the Harvard Law School.²⁵ The case method represented the application of Darwin's theory of evolution to an academic endeavor. Under this method, "the Constitution itself becomes a document that is at the disposal of the opinion of judges."²⁶ Generations of lawyers have been trained under this teaching method and the idea that one must look to court opinions in order to "find the law" has been thoroughly ingrained in the profession. "The legal profession itself is molded in the law schools. What is occurring in law and government today is merely the fruits of what was taught to the law students of yesteryear."²⁷ A seemingly innocuous innovation, the case method has had an almost unequalled impact upon law and government in the United States.

The evolutionary theory of law developed by Langdell soon led to the school of jurisprudential thinking known as Sociological Law. Initiated by Roscoe Pound, Langdell's successor, the basic theory of the movement "presupposes that no absolutes exist upon which law or laws can be based."²⁸ The break with Blackstone's "twin pillars" was complete: man no longer was to look to Divine guidance when formulating his laws. He was instead to look to his changing society and his own conception of "right" and "wrong" as influenced by the changes.

WHAT ARE THE JUDGES DOING— A BRIEF LOOK AT SOME RECENT THEORIES

The people should wake up to the fact that they have not a full popular sovereignty. They need to take another look at what the Court has been and is doing. Let them see that the Court violates the principle of the separation of powers, that it engages in politics, that it keeps amending the Constitution without recourse to the process of amendment, that it has made itself master of the land by judicial supremacy, that it offers a rule of men and not of laws, that it is undemocratic and is responsible to no one.²⁹

22. *Id.*

23. WHITEHEAD, *supra* note 8, at 26.

24. *Marbury v. Madison*, 1 U.S. (1 Cranch) 368 (1803).

25. WHITEHEAD, *supra* note 8, at 46.

26. *Id.* at 48.

27. *Id.* at 46.

28. *Id.* at 49.

29. HIGGINS, *supra* note 16, at 40.

Whether or not one agrees with the assumptions behind this statement from Thomas J. Higgins' *Judicial Review Unmasked*, it must be admitted that the mere existence of this view of the Supreme Court among responsible and learned legal scholars indicates that there is at least a perceptual problem caused by the Court. Whether the perception results from the Court's failure to adequately articulate the real bases for decision or is a true picture of what the Court is doing is of course open to debate. On a practical level, it is important for the practicing attorney to take the first step toward understanding what the courts are doing because the attorney who can predict what a court will do is the attorney who wins his or her case. On a theoretical level, all of us should be concerned with how our laws are made and enforced because of our responsibilities as citizens of a representative democracy. This section is intended to be the "first step of the first step." It discusses in general terms some of the currently popular (and possibly unpopular) theories and provides a foundation for further reading and study.

John Hart Ely

John Hart Ely's work, *Democracy and Distrust*, published in 1980, stimulated much comment and was hailed as an extremely important work.³⁰ As such, it is necessary to understand its basic approach if one is to capture the flavor of modern debate over judicial activism. Ely sets the stage for his analysis when he states in the preface to his book that:

Contemporary constitutional debate is dominated by a false dichotomy. Either, it runs, we must stick close to the thoughts of those who wrote our Constitution's critical phrases and outlaw only those practices they thought they were outlawing, or there is simply no way for courts to review legislation other than by second-guessing the legislature's value choices.³¹

Ely's purpose in writing the book, then, was to debunk both theories of constitutional jurisprudence then in vogue, interpretivism and noninterpretivism, and propose a more workable theory. The terms "interpretivism" and "noninterpretivism" occur with great regularity in the literature of this area of study and must be understood on at least a general level. "Interpretivism" is the orientation which results by interpreting only the textual provisions of the Constitution. As Perry states, "the effort is to ascertain, as accurately as available historical materials will permit, the character of a value judgment the Framers constitutionalized at some point

30. Meeks, *Forward, Judicial Review versus Democracy*, 42 OHIO ST. L.J. 1 (1981). The symposium was triggered by the publication of Ely's work and *Judicial Review and the National Political Process* by Jesse Choper. Selection of Ely's theories for inclusion in this article and the exclusion of Choper's work was largely arbitrary, although the general feeling among legal scholars seems to be that Ely's work is the more influential. Choper would limit judicial review to three areas. First, the Court should protect individual rights guaranteed by the Constitution against infringement by any arm of government regardless of its level. Second, it should insure that there are no encroachments upon national jurisdiction by state governments. Third, it should protect the authority of the judicial branch against incursions by either of the other two branches. Judicial review is not appropriate in any other area, says Choper. Benedict, *To Secure These Rights: Rights, Democracy, and Judicial Review in the Anglo-American Constitutional Heritage*, 42 OHIO ST. L.J. 69, 70 (1981).

31. J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* vii (1980).

in the past."³² In contrast, the noninterpretivist position holds that, while interpretive review is unquestionably legitimate in some instances, other cases require a decision reached through reference to some source of values and policy other than the Constitution.³³ It must be noted at this point that both interpretivism and noninterpretivism are theories of judicial review and therefore assume the legitimacy of the practice. Few works in the area acknowledge the assumption, however.

Ely begins his analysis in a negative vein by pointing out the fallacies he perceives in the "traditional" interpretivist and noninterpretivist positions. Interpretivism, he says, is attractive to many because, first, it is closer to what laymen perceive the law to be and to the usual concept of what the law is supposed to do. Second, the implications of a noninterpretivist approach are difficult to reconcile "with the underlying democratic theory of our government."³⁴ These two points actually seem to describe the same common conception of government in the United States—that it is a government of laws, not a government of men, and that those laws are made by the elected representatives of the governed. Ely sees the impossibility of pure "clause-bound" interpretivism as resulting from numerous open-ended clauses in the Constitution.³⁵ He identifies the fourteenth amendment due process, privileges and immunities, and equal protection clauses along with the ninth amendment as prime examples of these open-ended clauses. These clauses are couched in general language and have little substance standing alone. Unlike other specific clauses which are properly subject to interpretivist review, Ely believes that the open-ended clauses must draw their own substance from some source outside of the Constitution and the records of the Framers' debates.³⁷

Having "disproved" the interpretivist theories, Ely then moves to the theories in the area of noninterpretivism because those various theories attempt to solve the shortcomings of interpretivism by supplying a source of values to which the judge may look when engaging in review according to the open-ended constitutional clauses. Ely's position is that a valid approach to the interpretation of these clauses must be developed which is in line with the American concept of representative democracy, or "responsible commentators must consider seriously the possibility that courts should stay away from them."³⁸ Various outside sources of values often suggested by the noninterpretivist theorists are identified and rejected. The first source mentioned by Ely is the judge's own values. Theories suggesting that these values should control are often referred to as "realist" theories. The problem with this source, according to Ely, is that there is no guidance as to those values which should be imposed and that it is inconsistent with representative democracy.³⁹ The judge's desire to apply his own values

32. Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261, 264 (1981).

33. *Id.* at 264-65.

34. ELY, *supra* note 31, at 3-4.

35. *Id.* at 13-14.

36. Ely cites as an example of a clause with sufficient specificity to allow interpretive review the requirement "that the President 'have attained the Age of thirty-five years.'" *Id.* at 13.

37. *Id.* at 11-41.

38. *Id.* at 41.

39. *Id.* at 43-45.

does not provide sufficient justification for the practice. As Ely analogizes: "That people have always been tempted to steal does not mean that stealing is what they should be doing."⁴⁰

Ely next attempts to show that natural law should not serve as the extra-constitutional source of values required by the noninterpretivist theories. Resort to natural law has its basis in language found in both the Constitution and the Declaration of Independence and also in the debates of the Framers.⁴¹ Natural law principles are not satisfactory according to Ely, however, because they are too vague and difficult to discover. He says that "our society does not, rightly does not, accept the notion of a discoverable and objectively valid set of moral principles, at least not a set that could plausibly serve to overturn the decisions of our elected representatives."⁴²

Other alternative value sources identified and then refuted by Ely include neutral principles (general principles applied to all cases), reason, tradition, consensus, and progress prediction.⁴³ While his discussion of these alternatives is both interesting and educational, extended treatment of his reasoning is beyond the scope of this article. It is sufficient merely to note that he discounts each one and reaches the point in his analysis where, having discarded all other theories, he must formulate his own.

The theory proposed by Ely has its beginnings in a distillation of the judicial activism practiced by the Warren Court. The most significant case for Ely is *United States v. Carolene Products Co.*,⁴⁴ and the most significant part of that case is footnote four.⁴⁵ From this one footnote, Ely draws out the skeletal outline of his basic theory.⁴⁶ Stated in simple form, this theory is that the court's function is to keep the channels of political change open

40. *Id.* at 44.

41. *Id.* at 49.

42. *Id.* at 54.

43. *Id.* at 54-72.

44. 304 U.S. 144 (1938).

45. *Id.* at 152-53 n.4. Footnote 4, as edited by Ely, reads as follows:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth . . .

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation . . .

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities . . . ; whether prejudice against discrete and insular minorities may be a special condition which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

ELY, *supra* note 31, at 75-76.

46. *Id.* at 76. Raoul Berger points out that Ely attempts to ground the footnote in the Constitution while "Justice Stone spun his footnote out of thin air." Berger, *Ely's "Theory of Judicial Review"*, 42 OHIO ST. L.J. 87, 87 (1981). See also Tushnet, *Darkness at the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1045-46 (1980).

and to protect certain minority groups against improper discrimination.⁴⁷ These twin objectives are to be the only considerations when the Court engages in review under the so-called open-ended clauses. "[T]he general theory is one that bounds judicial review under the Constitution's open-ended provisions by insisting that it can appropriately concern itself only with questions of participation, and not with the substantive merits of the political choice under attack."⁴⁸

It may appear that Ely has actually proposed just another value source, such as those discussed above, to which the noninterpretivist judge may look when deciding a case. This is not a correct reading of Ely's theory because the noninterpretivist would use Ely's values of participation and representation to evaluate the substantive content of legislation. Ely's position is that the courts should not engage in substantive review but should instead focus on the process by which substantive decisions are reached. His theory is therefore clearly distinguishable from noninterpretive thought.

Michael J. Perry

The most recent major work in the area of judicial activism is Michael J. Perry's *The Constitution, the Courts and Human Rights*.⁴⁹ Like Ely's and Choper's works before it, Perry's book also generated great excitement and triggered a symposium on judicial review.⁵⁰

In the preface to his book, Perry states that his theory is "concerned with the legitimacy of constitutional policy-making (by the judiciary) that goes *beyond* the value judgments established by the framers of the written constitution," which he calls "extraconstitutional policymaking."⁵¹ He does not address the separate issue of the legitimacy of policy-making which is contrary to the framer's value judgments (contra-constitutional policymaking).⁵² Another subject which Perry avoids is the soundness of the constitutional doctrines produced by the extraconstitutional policymaking process.⁵³ He is not interested in the products of the process, only in the process itself.

Perry begins the development of his theory, as did Ely, with a discussion of the differences between interpretivism and noninterpretivism.⁵⁴

47. Grano, *Ely's Theory of Judicial Review: Preserving the Significance of the Political Process*, 42 OHIO ST. L.J. 167, 169 (1981).

48. ELY, *supra* note 31, at 181. Ely supports his theory with three "arguments." He says first that the Constitution is not "an evolving statement of general values" but is concerned with *procedural* fairness on an individual basis and "broad participation in the processes and distributions of government." *Id.* at 87. Second, the "underlying premises of democracy" support a theory which calls for reinforcement of representation. *Id.* at 88. Third, the courts are the most qualified arm of government for formulating and enforcing those values because they are experts on process and are political outsiders. *Id.* Ely calls his theory a "participation-oriented, representation-reinforcing approach to judicial review." *Id.* at 87.

49. M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* (1982).

50. *Judicial Review and the Constitution—The Text and Beyond*, 8 DAYTON L. REV. 443 (1983).

51. PERRY, *supra* note 49, at ix.

52. *Id.* See also Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1981).

53. PERRY, *supra* note 49, at 4-5.

54. *Id.* at 9-36. For a discussion of these differences, see *supra* text accompanying notes 31-32.

Also like Ely, Perry concludes that interpretive review is unquestionably legitimate, but does not provide an answer for all constitutional cases. At this point their approaches diverge: Ely claims to also reject traditional noninterpretive review while Perry's objective is to justify it.⁵⁵ The following statement sets the tone for the development of Perry's theory: "The justification for (noninterpretive review) . . . must be functional: If noninterpretive review serves a crucial governmental function that no other practice realistically can be expected to serve, and if it serves that function in a manner that somehow accommodates the principle of electorally accountable policymaking, then that function constitutes the justification for noninterpretive review."⁵⁶ He is thus seeking to defeat the position usually taken by interpretivists that there is no legitimate function for noninterpretivist review. He sets the criteria for determining the legitimacy of noninterpretivism in terms of function because he concedes there is no justification for it in either the text of the Constitution or its history.⁵⁷

Perry identifies three types of noninterpretive review: resolution of human rights issues, resolution of federalism issues, and resolution of separation of powers issues.⁵⁸ While his main emphasis is in the area of human rights, he first examines the question of whether "countermajoritarian noninterpretive review" serves any legitimate function in the areas of federalism and the separation of powers.⁵⁹

The "federalism" cases analyzed by Perry are those cases in which the issue is whether one government, either state or federal, has exceeded the scope of its constitutional authority and has thereby invaded the authority vested in the other government. He claims that the pertinent clauses, for example the commerce clause, are too vague to provide concrete guidance for the Court, and that its decisions are therefore based on "the Court's own judgment as to the exigencies" of the national interest at stake.⁶⁰

When the Court engages in review under these clauses and the issue is whether a state's laws have infringed upon federal authority, it would be possible to label the Court's action as noninterpretive review and to functionally justify it by pointing to the inability of Congress to completely regulate areas such as national commerce. Because Congress cannot totally preempt the area, it falls to the Court to decide whether specific state laws, although not in *direct* conflict with federal laws, "are consistent with the demands of national commerce."⁶¹ Perry declines to so categorize these decisions, however, and instead states that these federalism cases are in reality not constitutional cases and therefore do not involve noninterpretive review. He instead classifies the Court's actions in this area as

55. *Id.* at 23-25.

56. *Id.* at 24.

57. *Id.* at 91.

58. *Id.* at 37.

59. Perry's purpose for analyzing the legitimacy of noninterpretive review in these areas is to present a complete picture of his attempt to undermine interpretive theory. He believes that interpretivism may be totally discredited if just one legitimate function is found for noninterpretive review. *Id.*

60. *Id.* at 38.

61. *Id.* at 39.

legislative policymaking which is subject to revision by Congress.⁶² His view is even more radical when he considers judicial review of actions which claim that the federal government has violated the area of complete state sovereignty. Here he concludes that since Congress is composed of representatives elected from the *states*, that body is the proper one to protect the states from federal incursions. Because each member of Congress is "politically beholden" to a state constituency, they will necessarily be sensitive to state concerns.⁶³ From this assumption, he reaches the conclusion that *any* judicial review in this area, whether interpretive or noninterpretive, is illegitimate.⁶⁴

Perry next turns to judicial review in separation of powers cases. These cases he divides into two categories consisting of instances in which there is conflict between the executive and legislative branches and those in which there is concord. There is no reason for the Court to become involved, says Perry, when the case is of the latter type because it would merely be substituting its own judgment for that of the other two governmental branches.⁶⁵ As in the area of federalism, Perry states that there should be *no* exercise of judicial review in this type of case. If the case is one in which a conflict does exist, he points to the fact that the Constitution is extremely vague on the proper allocation of powers and concludes that noninterpretive review is therefore functionally justified. He does not feel that this conclusion aids his attempt to discredit interpretivism, however, because when the Court decides such a case it necessarily defers to the judgment of one or the other of the political branches. Such review thus does not pose a problem of legitimacy because deference to an electorally accountable branch of government does not run the risk of being "countermajoritarian."⁶⁶

Having failed to discredit interpretivism according to his established criteria, Perry next comes to what he calls "the heart of the matter: noninterpretive review with respect to issues of human rights—issues concerning the nature and extent of the (fundamental) rights of individuals vis-a-vis government."⁶⁷ It is in this area where Perry believes interpretivist theory falls short⁶⁸ and where he claims to find a functional justification for noninterpretive review. The reader should recall at this point that Perry's objective was to discredit interpretivism and its view that all noninterpretive review is illegitimate. The function he finds for noninterpretive review in human rights cases "is the elaboration and enforcement by the Court of values, pertaining to human rights, not constitutionalized by the framers; it is the function of deciding what rights, beyond those specified by the framers, individuals should and shall have against the government."⁶⁹ Perry believes this function is legitimate because the courts, being insulated from most political concerns, are more likely to

62. *Id.* at 40.

63. *Id.* at 43.

64. *Id.* at 45.

65. *Id.* at 50-51.

66. *Id.* at 49-60.

67. *Id.* at 61.

68. An interesting aspect of Perry's theory development is his extended criticism of Ely's theories. *Id.* at 61-90.

69. *Id.* at 93.

reach innovative answers to difficult "political-moral" questions than the traditional political process. This process, involving all of the long established practices and procedures of legislative action, is less likely to produce creative solutions because of its mechanistic, reflexive approach to problems.⁷¹ The legislature's political vulnerability encourages it to refer to established moral conventions rather than risking the ire of the electorate which may result from attempts to formulate new values. For Perry, then, the courts become instruments of social and moral change.⁷²

The concept of noninterpretive review in the area of human rights is at first blush inconsistent with the American concept of electoral accountability and representational democracy. The idea that justices may impose their value judgments upon the American people in preference to the judgments of elected officials and, possibly, in preference to the expressed majority opinion of the people themselves is certainly repugnant. Perry reconciles his theory with the American concept of democracy by arguing that Congress' power over the appellate jurisdiction of the Supreme Court under article III of the Constitution⁷² gives an electorally accountable branch of government significant control over the Court's nonconstitutional policymaking.⁷³

*Thomas J. Higgins*⁷⁴

This theory refutes the basic assumption of both noninterpretive and interpretive theories: the legitimacy of *all* judicial review. In his book, *Judicial Review Unmasked*, Higgins attempts to refute the assumption of valid judicial review through examination of the Constitution and history. Higgins begins with a definition of judicial review and states that it "is a control exercised by the judiciary over *co-equal* branches of the government" as opposed to control "over *subordinate* corporations and units of government such as municipalities to which some kind of legislative power has been delegated."⁷⁵ He also states that he is not referring to judge-made law which develops from the enforcement and interpretation of laws; rather, he is addressing outright intervention in the legislating process.

The first substantive examination made by Higgins concerns whether judicial review has a legitimate origin. The first possible source he examines is the "natural" function of judges.⁷⁶ The argument here is that a judge, simply because he is a judge, has the power to decide whether the laws he administers are constitutionally valid. The invalidity of the natural power of a judge was easy to demonstrate because even the most cursory examination of history reveals that judges have not always exercised the power of judicial review. Higgins quotes the Code of Justinian: "It remains

70. *Id.* at 102.

71. *Id.*

72. U.S. CONST. art. III, § 2.

73. PERRY, *supra* note 49, at 128.

74. It would of course be possible, and probably logical, to present the views of an interpretivist at this point. See generally BERGER, *GOVERNMENT BY JUDICIARY* (1977). The purposes of this article would not be furthered by such a presentation, however, because a clear view of interpretivism and its implications is present in the discussion of Ely's and Perry's theories.

75. HIGGINS, *supra* note 16, at 11.

76. *Id.* at 13.

77. *Id.* (quoting *The Institutes of Justinian*, Lib. IV, Tit., XVII, ed. Thomas Cooper (1812)).

for us to inquire into the office and duty of the judge whose first care it ought to be not to determine otherwise than the laws, the received jurisprudence, or customs and usages direct."⁷⁷ As a contemporary example, he points out the fact that France does not allow judicial review.⁷⁸ Judicial review in America, says Higgins, originated not in the natural power of judges but in the exercise of the power of review over colonial legislation by the royal governors and the Privy Council in London.⁷⁹ The continuation of this practice after independence was not necessary.

The second possible source examined by Higgins is the Constitution itself. He initially states that the Convention of 1787 made no provisions in the Constitution for judicial review. Of greater significance than its absence from the text is the fact that several advocates of judicial review proposed that a discretionary veto power over acts of Congress be given to the Supreme Court. The convention voted the proposal down by a vote of eight states to three.⁸⁰ Some commentators admit that no express provision for judicial review may be found but argue that certain provisions may be interpreted in such a way as to find authority for judicial review.⁸¹ These arguments are likewise undermined by Higgins' use of the historical background to the Constitution.⁸²

Having demonstrated that judicial review is not a natural function of a judge, nor is it authorized by the text of the Constitution, Higgins concludes that the Court simply took the power and turns to the analysis of *Marbury v. Madison*⁸³ to describe how it was accomplished. He first recounts the now-familiar historical context of the case and states that: "Marshall was determined to annul some act of Congress whenever opportunity would afford. The reasoning was not important; any stick would serve to beat the Anti-federalist dog."⁸⁴ Marshall's major premise for engaging in judicial review was that the validity of statutory law must be measured by the criterion of a written constitution. Any statute which is contrary to the Constitution is not law.⁸⁵ This is obviously not a startling proposition. It is Marshall's minor premise in which Higgins finds fault: "That it is the function of the Court to make the comparison between the statute and the Constitution and to declare void those statutes which it considers contrary to the Constitution."⁸⁶ The problem with the minor premise is that it assumes its conclusion. A more valid position from the text of the Constitution, says Higgins, is to conclude that the people themselves have the authority and power to ensure that any mistakes made by the legislature are corrected.⁸⁷

78. *Id.* at 14.

79. *Id.* at 17.

80. *Id.* at 19.

81. Alexander Bickel, cited by Higgins, says "The authority to determine the meaning and application of a written constitution is nowhere defined or mentioned in the document itself. This is not to say that the power of judicial review cannot be placed in the constitution, merely that it cannot be found there." A. BICKEL, *THE LEAST DANGEROUS BRANCH* 1 (1962). Among the provisions most often cited for containing the implied authority for judicial review are article 3, § 1 and article 4, § 2.

82. HIGGINS, *supra* note 16, at 20-26.

83. 5 U.S. (1 Cranch) 368 (1803).

84. HIGGINS, *supra* note 16, at 33.

85. *Id.* at 34.

86. *Id.*

87. *Id.* at 35.

After concluding that the Court took the power of judicial review without authority, Higgins next outlines two arguments as to why the Court should not be allowed to retain the power. The first argument is that judicial review violates the theory of the separation of powers. The concept of separation of powers adopted by the framers was taken from Montesquieu and provides for division of government into three independent branches.⁸⁸ The Constitution nowhere provides for one of the branches to assume a superior role by determining the boundaries of each branch's power.⁸⁹ When the court engages in review of controversies concerning the relative powers of the branches of government, it is violating the principle of separation of powers. It is in essence exercising powers given to the other branches when it reviews and modifies their actions.

Higgins' second argument is that judicial review establishes the supremacy of the judiciary. The American revolution, he says, had as its objectives the overthrow of a government in which all power rested in one man and the establishment of a government in which power is diffused.⁹⁰ The Court, however, has forced a return to a government in which power is concentrated rather than diffused. It has done this through its assumed role as policymaker and even lawmaker. Higgins points to *Furman v. Georgia*,⁹¹ in which the Court negated the laws of capital punishment, and *Roe v. Wade*,⁹² the landmark abortion decision, as prime examples of judicial sovereignty.⁹³ In closing his argument, Higgins states that the supremacy of the Court can be clearly seen in the differences between the law reports of the English Courts and those of the Supreme Court. While the English Courts use acts of Parliament as the basis for their authority, "[t]he Supreme Court bases its authority upon the cases it has previously decided. Occasionally it mentions a law of Congress, usually to declare it void."⁹⁴

Because Higgins finds that exercise of judicial review violates the principle of separation of powers and illegitimately establishes the supremacy of the Court, he goes on to examine the consequences of "illegal" judicial review. Among the results are the involvement of the Court in politics,⁹⁵ a "rule of men, not of law,"⁹⁶ government by litigation,⁹⁷ and a break-down of the democratic processes.⁹⁸ Higgins engages in detailed proofs of all these contentions and finally arrives at the point where he lays out a scheme for curing the ills he perceives in the functioning of the Court.

88. *Id.* at 44.

89. *Id.* at 52. In Federalist Paper #49, Madison says "The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers." THE FEDERALIST No. 49, at 339 (J. Madison) (J. Cooke ed. 1961).

90. HIGGINS, *supra* note 16, at 51.

91. 408 U.S. 238 (1972).

92. 410 U.S. 113 (1973).

93. HIGGINS, *supra* note 16, at 69.

94. *Id.*

95. *Id.* at 76.

96. *Id.* at 95.

97. *Id.* at 165.

98. *Id.* at 130.

Defining the objective for his plan is simple: a "return to the original scheme envisioned by the Constitution: a national Congress to look after the universal concerns of the nation, the States to take care of the people's more specialized concerns."⁹⁹ Accomplishment of this objective is to be through the amending process provided for by the Constitution. In the interim, Congress should pass legislation forbidding the Court to strike down the laws of Congress. To ensure that the Court does not strike down the new act, Congress should exercise its appellate jurisdiction-limiting power and take away the Court's power to review cases arising under the act.¹⁰⁰

DOES ALL THIS REALLY MATTER AND IS THERE A RIGHT ANSWER?

Debate over the proper role of the Court and, by inference, all courts, is pointless unless there is some reason to be concerned by the issue. It could be argued that since the goal of all the approaches is to establish a system of laws which perfectly addresses the needs of man, it makes no difference which method is used if the goal is always remembered. While this observation may be valid in the abstract, only slightly more analytical thinking reveals that the conception of "the needs of man" differs radically among adherents of different approaches. Indeed, the means of achieving the "perfect system" may alter the definition of the final goal.

As illustrated in the theoretical discussion of Blackstone's theories and the "contributions" of Langdell¹⁰¹ along with the extension of their views to systematic theories of judicial review, one's view of the role of the practice is shaped by basic concepts of the nature and function of law. The "evolutionists," typified by noninterpretivists such as Perry and "new thinkers" such as Ely and Choper, view the law's function in terms of meeting man's needs at a given time under changing conditions. The law evolves according to man's changing environment. Those favoring a static view of law see the law as determining man's environment rather than the environment determining the law. The law governs men; men do not govern the law.

When reaching a conclusion as to which theory of judicial review is "right," one must consider personal opinions on the proper role of the law, the proper role of the judiciary in the American governmental system, and the proper relationship between man and his society. One's belief or nonbelief in a Divine Being who orders the universe and has established an order for the conduct of man's affairs must also be a prime consideration.

It is the author's opinion that adherence to a Judeo-Christian belief system mandates a static view of the law. The writings of Blackstone and the Bible itself demonstrate that God has established laws by which man is to govern himself. These laws are discoverable through reference to the Scriptures. As Whitehead says: "Law in the Judeo-Christian sense implies something more than form. Law has content in the eternal sense. It has a

99. *Id.* at 265.

100. *Id.*

101. See *supra* text accompanying notes 18-28.

reference point. Like a ship that is anchored, law cannot stray far from its mooring. If the anchor chain breaks, however, the ship drifts to and fro."¹⁰² A drifting ship has no direction and is likely to cause great damage. Because of man's fallen state, God's law is likely to be interpreted in different ways,¹⁰³ but this fact should not discourage earnest attempts to find the true meaning and provide direction for the country. Indeed, God's basic laws embodied in the Ten Commandments are fairly simple to understand and apply.

Combining a static view of law with the traditional view of representational democracy like that espoused by Higgins,¹⁰⁴ mandates a certain view of the proper function of the branches of government. The proper role of the legislature is to formulate laws in an attempt to establish a society which is governed according to the principles set out by God. In accomplishing this, the legislature must also look to the Constitution for guidance since the Constitution is the embodiment of the views of the people as to what actions are necessary and permissible.¹⁰⁵ It would seem that legislative action today overlooks both these sources of guidance and instead considers only the personal views of the legislators and, sometimes, vocal segments of their constituency. This failure is in response to judicial usurpation of the function of reviewing laws as to their constitutionality and contributes to the practice of judicial activism.

The proper function of the Court, as defined by Higgins, Whitehead, Blackstone and others, is to interpret the laws passed by Congress in light of the legislature's objectives, as applied in specific cases. One function left unfilled, then, is review of acts of Congress and the Executive Branch under constitutional criteria. The proper way to ensure review of the acts of the legislature is through the electorate. The people must assume the responsibility for oversight of their elected representatives. Higgins points out that "judicial review assumes that the people do not understand the Constitution and will not respect it, but that [the] Court does understand it and will respect it."¹⁰⁶ In a representational democracy such as ours, however, the very basis of government must be found in the responsibility and understanding of the electorate. When those in power decide that they, rather than the people, should take responsibility for determining the propriety of laws, democracy crumbles and is replaced by dictatorship or oligarchy. If the representatives of the people pass an unconstitutional or undesirable law, the people may inform them of that fact. Should remedial action still not be forthcoming, the ultimate weapon of the people is still available—elections.¹⁰⁷

Finally, amendment of the Constitution should not be accomplished incrementally by an insulated body which is not responsible to any constituency. The Constitution must not be seen as a living document, but should be viewed as a static guide for specific laws. Amendment should be

102. WHITEHEAD, *supra* note 8, at 73.

103. *Id.*

104. See *supra* text accompanying notes 88-98. See also SCHAFFER, A CHRISTIAN MANIFESTO (1981).

105. HIGGINS, *supra* note 16, at 48.

106. *Id.* at 138.

107. *Id.* at 139.

accomplished through the procedure set out in the Constitution¹⁰⁸ and should be directed at the goal of establishing a society ordered according to God's law.

WHAT CAN BE DONE?

After examining the various theories and their own values or beliefs, attorneys who have arrived at the conclusion that the activism of the United States Supreme Court and other federal and state courts is unconstitutional must alter their behavior accordingly. A belief that judicial activism is antithetical to Judeo-Christian ideals and representational democracy will necessarily lead to a desire to limit the activist tendencies of the courts.

The program outlined by Higgins has much to commend it as a general plan.¹⁰⁹ The practicing attorney, however, needs a plan or set of guidelines with which to make daily decisions. Whitehead sets out such a plan in *The Second American Revolution*.¹¹⁰ While his principles are aimed specifically at the Christian lawyer, most are adaptable for use by all lawyers holding to the static, traditional viewpoint outlined above.

The first principle laid out by Whitehead is that lawyers must remind themselves on a daily basis that they can and do have an effect on the American legal system.¹¹¹ American government and society are based upon the law and it is in this area that one person may have the greatest impact. This realization must be combined with the attitude that the lawyer's own beliefs should be integrated into his or her professional conduct.¹¹² Lawyers too often leave their ideas, beliefs, and values at home in the morning and view "lawyering" as just another business where the sole objective is to make as much money as possible. If the legal profession is truly experiencing a downward trend, the failure of lawyers to view the profession as a high calling is certainly one major cause.¹¹³

After integrating their personal and professional lives, lawyers should then "become aggressively and actively involved in the local community affairs and politics."¹¹⁴ For many this kind of involvement comes naturally. For others, it may be difficult at first, especially since the viewpoint being advocated is currently unpopular. This involvement should also extend to participation in the various bar associations. Many of these are little more than social organizations but could be transformed into influential political interest groups.¹¹⁵

To this list I would add that it is important to search for the "right" cases. If the rare case comes along in which the client's interests could be

108. *Id.* at 265.

109. See *supra* text accompanying notes 99-100.

110. WHITEHEAD, *supra* note 8.

111. *Id.* at 172.

112. *Id.*

113. *Id.* at 173.

114. *Id.* at 172.

115. *Id.* at 173.

furthered through advocacy of a restricted, static view of the Constitution or of traditional concepts of democracy, the anti-activist lawyer should take it regardless of the potential remuneration. Economic realities must be considered, of course, but fees should be secondary factors in deciding whether to take the case. On the opposite side of searching for the right case is avoiding the wrong case. If at all possible, the case which would require arguing for an "extension" of constitutional doctrines or, for example, a decision favoring one branch of government over another should be avoided. This course of action must be tempered with the realization that the Code of Professional Responsibility requires that an attorney not intentionally "[f]ail to seek the lawful objectives of his client through reasonably available means permitted by law."¹¹⁶ In addition, there is a duty to make legal advice available to a certain degree.¹¹⁷ Ethical Consideration 2-30 does provide, however, that "a lawyer should decline employment if the intensity of his personal feeling, as distinguished from a community attitude, may impair his effective representation of a prospective client."¹¹⁸

CONCLUSION

The issue of whether an active judiciary is either legitimate or desirable is crucial to the future of this country. Too many attorneys ignore their responsibility as legal professionals to take an active interest in the issue and thereby leave its resolution to academicians and the judges themselves. Lawyers should examine the development of constitutional jurisprudence beginning with Blackstone's writings, continuing with the development of Sociological Law theories, and ending with modern theories of judicial review, such as those of Ely, Perry, and Higgins. The lawyers' personal value system should then be applied to the various theories and a decision as to which theory is correct should result. Finally, the lawyers should fulfill their professional responsibility by acting consistently with their decision.

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116. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(1) (1979).

117. *Id.* EC 2-26 through EC 2-33 (1979).

118. *Id.* EC 2-30 (1979).